

Wilson

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

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STATES COURT OF APPEALS

HAROLD WEISBERG,
Appellant,

v.

CENTRAL INTELLIGENCE AGENCY,
ET AL.,

Appellees

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~~Civil Action No. 75-1996~~
Case No. 79-1729

REPLY TO APPELLEES' OPPOSITION TO APPELLANT'S
MOTION FOR LEAVE TO SUPPLEMENT THE RECORD

On May 15, 1980, appellant filed a Motion for Leave to Supplement Record which asked the Court to take cognizance of certain newly discovered evidence and to remand this case to the District Court pursuant to 28 U.S.C. § 2106. The newly discovered evidence consisted of the following:

1. An affidavit which was executed on April 30, 1980, by CIA official Gerald L. Liebenau and filed in U.S. District Court on May 7, 1980, in the case of Harold Weisberg v. U.S. Department of Justice, Civil Action No. 75-1996. The Government submitted the Liebenau affidavit in that case in response to Weisberg's April 9, 1980 motion for partial summary judgment with respect to

ten FBI Headquarters MURKIN^{1/} records which the FBI had referred to the CIA in 1977.^{2/} It asserted that nine of the ten referrals "were dealt with" in Harold Weisberg v. Central Intelligence Agency, et al., Civil Action No. 77-1997, the case which led to this appeal.^{3/} As to the tenth MURKIN referral, described as "an informal, three-page biographic statement, stamped Secret, concerning one individual apparently received from the CIA on 17 April 1968," Mr. Liebenau stated: "The document is currently being reviewed for possible release under FOIA to plaintiff Weis-

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- 1/ "MURKIN" is the FBI acronym for "murder of King." The Headquarters MURKIN file contains some 6,000 serials totaling approximately 20,000 pages. Virtually every document in this file bears the Headquarters MURKIN file number, Number 44-38861, and a serial number. Each of the ten MURKIN documents referred to the CIA was assigned a specific MURKIN serial number.
- 2/ Six of the ten documents are said to have been referred to the CIA on March 17, 1977, the rest latter that year. On June 8, 1978, more than a year after the date of most of these referrals, the FBI informed Weisberg by letter that: "All CIA documents located in FBI files which relate to the Assassination of Dr. King have been returned to that agency for their direct response to you." There having been no response, direct or otherwise, in the ensuing 22 months, on April 9, 1980, Weisberg filed in Civil Action No. 75-1996 a motion for partial summary judgment with respect to the FBI copies of these ten documents.
- 3/ Because the ten referrals are copies of CIA records transmitted to the FBI in connection with its investigation into the assassination of Dr. King and incorporated into its MURKIN files, the Document Disposition Index which accompanies the affidavit of Robert E. Owen which was filed in Civil Action No. 77-1997 on May 26, 1978, should have identified ten CIA originals that correspond to the ten MURKIN referrals. According to Liebenau, the Owen Document Disposition Index "dealt with" only nine. (April 30, 1980, Liebenau Affidavit, ¶2)

berg, who will be advised directly of the determination."^{4/} Thus the Liebenau Affidavit appears to establish the fact that the CIA original of the document received by the FBI on April 17, 1968, was not accounted for in the Document Disposition Index filed on May 26, 1978. This discrepancy brings into question the adequacy of the search made by the CIA in this case.

2. In checking his voluminous records on the assassination of Dr. King to see if he could make a meaningful identification of any of the ten documents referred to in the Liebenau Affidavit, Weisberg located records which may indicate that the FBI has released in Civil Action No. 75-1996, with CIA approval, records which the CIA is withholding in toto in this case. For example, FBI MURKIN serial 2404 bears the same date and number of pages as the record the CIA designated as Document No. 265. In addition, although the description of Document No. 265 is admittedly very generalized, there is nothing in the released content of MURKIN

^{4/} The CIA has now had more than a month in which to review this three-page document. As of this date Weisberg has not been advised of any determination that has been made. In Civil Action No. 75-1996, the Government takes the position that the ten MURKIN referrals are "CIA material and may not be released by the FBI." (Memorandum in Opposition to Plaintiff's Motion for Partial Summary Judgment Regarding Ten CIA Documents filed May 7, 1980, pp. 1-2) If this is the case, then the CIA should have processed the ten referrals in connection with this case, Civil Action No. 75-1997. In effect, the Government is telling Weisberg, five years after he instituted Civil Action No. 75-1996 and three years after the FBI referred these MURKIN records to the CIA, that he must now commence a new suit against the CIA for these ten MURKIN referrals.

serial 2404 is inconsistent with that description.^{5/} If MURKIN serial 2404 and CIA Document 265 do in fact have the same content, then this obviously bears directly on the CIA's claim that the latter is entirely exempt from disclosure, since most of the former already has been disclosed with CIA approval.

In opposition to Weisberg's motion, the CIA asserts that Weisberg "can offer nothing more than the possibility that the CIA failed to retrieve one arguably responsive document in its search, and his own guesswork concerning the possible similarity between the contents of two FBI documents involved in another case and those of two CIA documents involved in this one." (Opposition, p. 4) The CIA also argues that on the basis of this Court's decision in Goland v. Central Intelligence Agency, 197 U.S.App.D.C. _____, 607 F.2d 339 (1978), a remand pursuant to 28 U.S.C. § 2106 is not appropriate in this case.

This Court's appellate jurisdiction includes the power to "remand the cause and . . . require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106 (1970). As this Court noted in Gomez v. Wilson, 155 U.S.App.D.C. 242, 248, 477 F2d 411, 417 (D.C.Cir. 1973), "[t]his broad authorization clearly encompasses remands for the purpose of . . . taking additional evidence"

^{5/} The CIA's description of Document 265 is found at page 429 of the Appendix. MURKIN serial number 2404 is attached as Exhibit 2 to the affidavit of Harold Weisberg which was submitted in support of the Motion for Leave to Supplement Record With Newly Discovered Evidence.

This Court has recognized that exercise of this broad power to remand is appropriate in an FOIA case where "a substantial change in the factual context of the case" appears for the first time during the pendency of the appeal. Jordan v. Department of Justice, 192 U.S.App.D.C. 144, 171, 591 F.2d 753, 780 (1978). In addition, the Supreme Court has indicated that the broad remand power granted by § 2106 must be exercised where information disclosed during the pendency of an appeal suggests that a party has perpetrated a fraud upon the court or courts below. In United States v. Shotwell Manufacturing Co., 355 U.S. 233 (1957), the Court stated:

It is obvious that the Government's new evidence casts the darkest shadow upon the truthfulness of the disclosure testimony given by or on behalf of the respondents in the District Court Were we to undertake to review the Court of Appeals upon a record as suspect as this, we might very well be lending ourselves to the consummation of a fraud which may already have made the Court of Appeals its unwitting victim. In these circumstances it is imperative that the case be remanded to the District Court for a full exploration of where the truth lies before the case is allowed to proceed further. The integrity of the judicial process demands no less. 355 U.S. at 240-241. (Emphasis added)

As in Shotwell, Weisberg's proffered new evidence "casts the darkest shadow upon the truthfulness" of the CIA's representations to this Court and to the District Court. A document which plainly should have been retrieved by the CIA and identified to Weisberg and the District Court as one that was responsive to his FOIA request was not so identified. In addition, other newly discovered

evidence indicates that information previously released by the FBI, with CIA approval, has the same content as documents which the CIA continues to withhold in their entirety in this case. This bears directly on the bona fides of the CIA's representation that these documents are exempt in toto.

The Goland case relied upon by the CIA is not apposite. In Goland the discovery of hundreds of records arguably responsive to plaintiffs' request was, according to the CIA, "entirely adventitious."

They were found by the law librarian in the course of independent research on projects unrelated to the Goland litigation. The documents were not indexed; they were found, only after extraordinary effort, stored in cardboard boxes primarily among the 84,000 cubic feet of documents at CIA's retired-records center outside of Washington. According to CIA, the documents "could not have been found under normal FOIA procedures." Goland, supra, 197 U.S.App. D.C. at _____, 607 F.2d at 370.

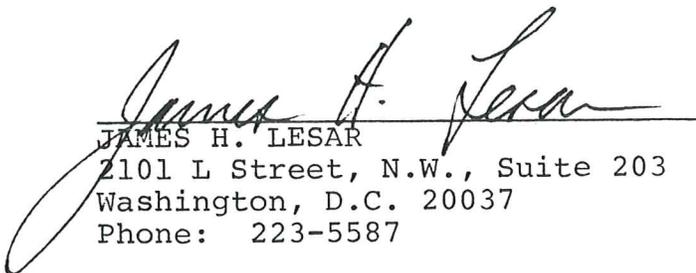
The CIA has made no such representations in this case. The CIA does not claim that the CIA document which corresponds to the tenth MURKIN referral was not indexed. If such a claim were made, it would not be credible. In addition, in Goland the CIA did advise the Department of Justice of its discovery, albeit belatedly, and Justice did inform this Court. Here it was Weisberg, not the CIA, who informed this Court of the discrepancy between the Liebenau Affidavit and the Owen Document Disposition Index. Yet the CIA has to have known of the discrepancy at least as early as April 30, 1980, and most likely two weeks or more before that.

In Goland this Court indicated that it would be inclined to upset the judgment in that case only if it were to indulge in a fairly harsh inference about the bona fides of the CIA. The record in this case amply demonstrates the mala fides of the CIA both in this litigation and in connection with other FOIA cases and requests involving this appellant. The pattern of conduct which emerges makes it clear that the CIA employs a variety of tactics which are calculated to delay or deny access to information while at the same driving up the cost of obtaining it. Such tactics range from simply ignoring FOIA requests until suit is filed, as the CIA has done with this appellant, to spuriously invoking Exemptions 1 and 3 for the nonexempt transcripts of Warren Commission executive sessions, as the CIA has also done with this appellant. They also include refusal to search promptly or thoroughly for responsive documents in the manner required by the FOIA.

The tactics employed by the CIA in this and other FOIA cases inevitably erode the integrity of the judiciary and subvert the FOIA. The FOIA was intended to facilitate the prompt disclosure of government information. The CIA, taking advantage of the reluctance of district courts to allow FOIA plaintiffs to engage in discovery and the reticence of appellate courts to expand the record made in district court, is making a joke of the Freedom of Information Act. It is time for this Court to halt the pernicious practices indulged in by the CIA and other agencies. This may be accomplished in this case by remanding the record in this case to

the District Court so that Weisberg may be afforded the opportunity of exploring the new evidence that has come to his attention. Surely, the "integrity of the judicial process demands no less" than the remanding of the record in this case "for a full exploration of where the truth lies." Shotwell, supra, 355 U.S. at 240-241.

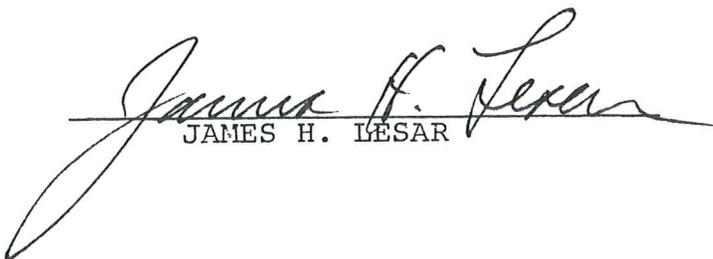
Respectfully submitted,


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CERTIFICATE OF SERVICE

I hereby certify that I have this 2nd day of June, 1980, mailed a copy of the foregoing Reply to Appellees' Opposition to Appellant's Motion for Leave to Supplement Record to Margaret E. Clark, Attorney, Civil Division, U.S. Department of Justice, Washington, D.C. 20530.


JAMES H. LESAR